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Defendant Yandex N.V.

11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

14 PERFECT 10, INC.,

15 Plaintiff,

16 vs.

17 YANDEX N.V.,

18 Defendant.

19 CASE NO. CV-12-1521-WHA

20 **SPECIALLY APPEARING PARTY**
YANDEX N.V.'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION

21 Date: June 14, 2012

22 Time: 8:00 a.m.

23 Crtrm.: 8

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1 Introduction

2 In its opposition, Perfect 10 makes no effort to defend its sparse and factually incorrect
3 allegations of personal jurisdiction. Rather, it makes two primary, but fundamentally flawed,
4 arguments as to why this Court should exercise personal jurisdiction over Yandex N.V.

5 **First**, Perfect 10 argues that by Yandex N.V. designating an agent for service of process, it
6 has consented to the general personal jurisdiction of this Court. That argument ignores clear
7 precedent that an agent for service of process is **not** consent to jurisdiction in California. This
8 Court should decline Perfect 10's invitation to reject decades of settled precedent. **Second**, Perfect
9 10 argues that Yandex N.V. and its subsidiaries are a single enterprise that exists and functions as
10 one, and thus all corporate distinctions and legal formalities should be ignored. But Yandex N.V.
11 has provided an uncontested, sworn declaration from director Elena Ivashentseva that its
12 subsidiaries, including Yandex Inc. and Yandex LLC, are independently-run, legal entities for
13 whom the separate corporate formalities have been respected. Perfect 10's opposition ignores this
14 evidence entirely. Instead, Perfect 10 attaches selected pages from SEC filings that refer to the
15 entities collectively as "Yandex" and describe certain business activities without identifying the
16 specific legal entity responsible. These descriptions, however, fail to show that Yandex's
17 subsidiaries are either "agents" or "alter egos" of their parent corporation, which is required before
18 the Court may impute contacts. Indeed, the key statement that Perfect 10 points to, that Yandex
19 N.V. "operate[s] as a single business segment," is actually an accounting term of art that has no
20 bearing on alter ego or corporate formalities. In any event, binding Ninth Circuit case law
21 instructs that such statements have **no** weight in a personal jurisdiction analysis.

22 In addition to advancing these flawed arguments, Perfect 10 also belatedly requests a slew
23 of jurisdictional discovery from no fewer than three different companies, seeking documents
24 located around the world spanning over a five-year time period. However, at no point does Perfect
25 10 attempt to justify this far-reaching and burdensome discovery by tying it to any specific legal
26 theory that would justify personal jurisdiction. Instead, Perfect 10 seeks permission from the
27 Court to embark on a fishing expedition, hoping to locate some information that it might use to
28 bolster an unspecified personal jurisdictional argument. This Court need not entertain such an

1 abusive request.

2 The Court should deny Perfect 10's discovery fishing expedition request and grant Yandex
 3 N.V.'s motion to dismiss for lack of personal jurisdiction.

4 **Argument**

5 **I. PERFECT 10'S OPPOSITION DOES NOT ATTEMPT TO DEFEND ITS DEFECTIVE
 6 JURISDICTIONAL ALLEGATIONS**

7 In its opposition papers, Perfect 10 does not even attempt to defend the thin and factually
 8 incorrect jurisdictional allegations contained within its complaint. Nor could it, since “[m]ere
 9 ‘bare bones’ assertions of minimum contacts with the forum or legal conclusions unsupported by
 10 specific factual allegations will not satisfy a plaintiff’s pleading burden.” *Fiore v. Walden*, 657
 11 F.3d 838, 846-47 (9th Cir. 2011). The sole factual basis for jurisdiction set forth in Perfect 10’s
 12 complaint is the claim that Yandex N.V. directly “owns and operates” various Internet websites
 13 and “operates a research facility” in Palo Alto, California. These allegations are contrary to facts
 14 that Perfect 10’s opposition grudgingly acknowledges, as well as by the sworn declaration from
 15 Yandex N.V. director Elena Ivashentseva, the contents of which Perfect 10 has not contradicted,
 16 objected to or otherwise challenged in any substantive way.

17 Perfect 10 must appropriately allege the basis for personal jurisdiction in its complaint but
 18 has failed to defend its defective pleading of personal jurisdiction in this case. For that reason
 19 alone, the Court should grant Yandex N.V.’s motion to dismiss.

20 **II. YANDEX N.V. HAS NOT CONSENTED TO THE JURISDICTION OF THE COURT**

21 Perfect 10 also argues that Yandex N.V. has consented to the general jurisdiction of this
 22 Court by designating a domestic agent for service of process in connection with its regulatory
 23 filings with the United States Securities and Exchange Commission. Perfect 10 urges this Court to
 24 follow *Knowlton v. Allied Van Lines, Inc.* 900 F.2d 1196 (8th Cir. 1990), and find that the
 25 designation of an agent for service of process is a consent to general personal jurisdiction.

26 What Perfect 10 fails to mention is that this Eighth Circuit case was interpreting and
 27 applying ***Minnesota state law*** when it ruled that designation of an agent for service of process
 28 constitutes consent to general personal jurisdiction. *Id.* at 1199. As the Eighth Circuit held, the

1 Minnesota long-arm statute governing the effect of designation of an agent for service of process
 2 was inherently unlimited, noting that “[t]here are no words of limitation to indicate that this type
 3 of service is limited to claims arising out of activities within the state.” *Id.* The Eighth Circuit
 4 also specifically noted that “[t]he effect of such a designation can be limited to claims arising out
 5 of in-state activities and some statutes are so limited.” *Id.*

6 In contrast, California law, which governs here, explicitly holds that designation of an
 7 agent for service of process is ***not consent to personal jurisdiction***. *See, e.g., Thomson v.*
 8 *Anderson*, 113 Cal. App. 4th 258, 270 (2003); *Tri-West Ins. Servs., Inc. v. Seguros Monterrey*
 9 *Aetna, S.A.*, 78 Cal. App. 4th 672, 676-77 (2000); *Gray Line Tours of Southern Nevada v.*
 10 *Reynolds Elec. & Eng’g Co., Inc.*, 193 Cal. App. 3d 190, 193-95 (1987); *see generally* Weil et al.,
 11 CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL (2011 ed.) at § 3:210.4 (“A
 12 foreign corporation’s designation of an ***agent for service*** of process in California is ***not a***
 13 ***submission to personal jurisdiction*** here.”) (emphasis in original). Thus, although service of
 14 summons may be made on the designated agent, an action “cannot be maintained against a foreign
 15 corporation absent ‘minimum contacts’ with California.” Weil et al. at § 3:210.4.

16 Yandex N.V. made this clear in its opening papers. *See* Motion at 9:1-10. Perfect 10’s
 17 opposition papers ignore these authorities and instead misleadingly suggest that this is an open
 18 question. *See* Opposition at 7-8. It is not. Under the California long-arm statute, unlike the
 19 Minnesota law at issue in *Knowlton*, designation of an agent for service of process cannot
 20 constitute consent to personal jurisdiction.

21 **III. PERFECT 10’S OPPOSITION IGNORES THE UNDISPUTED FACT THAT YANDEX**
N.V. IS A SEPARATE ENTITY FROM ITS SUBSIDIARIES

22 Perfect 10’s opposition is devoted to arguing that because various Yandex N.V.
 23 subsidiaries share the “Yandex” brand for their products (including not only for Internet search
 24 functions, but also e-mail, cloud storage, maps service, music service, mobile device applications,
 25 and electronic payment functionality), ***all*** such entities and products are, in reality, attributable to
 26 Yandex N.V. as a single monolithic corporate entity, without any regard for corporate form or
 27 binding precedent. This falls far short of presenting a *prima facie* case for personal jurisdiction.
 28

1 *See, e.g., Dole Food Co. v. Patrickson*, 528 U.S. 468, 475 (2003) (“The doctrine of piercing the
 2 corporate veil, however, is the rare exception, applied in the case of fraud or certain other
 3 exceptional circumstances.”).

4 Binding Ninth Circuit precedent, as acknowledged by Perfect 10, dictates that a subsidiary
 5 cannot be treated as one and the same as its parent unless it acts as an “agent” or “alter ego” of the
 6 parent. *See Doe v. Unocal Corp.*, 248 F.3d 915, 929-30 (9th Cir. 2001); *see also* Opp. at 8:20-24
 7 (stating test). It is not enough that a parent-subsidiary relationship exist. *See, e.g., Unocal*, 248
 8 F.3d at 925 (“The existence of a relationship between a parent company and its subsidiaries is not
 9 sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries’
 10 minimum contacts with the forum.”); *see also Katzir’s Floor & Home Design, Inc. v. M-*
 11 *MLS.com*, 394 F.3d 1143, 1149 (9th Cir. 2004) (“The mere fact of sole ownership and control
 12 does not eviscerate the separate corporate identity that is the foundation of corporate law.”);
 13 *Mizokami Bros. of Ariz., Inc. v. Baychem Corp.*, 556 F.2d 975, 977 (9th Cir. 1977), cert. denied
 14 434 U.S. 1035 (“mere existence of the parent-subsidiary relationship is not alone a sufficient basis
 15 for long-arm jurisdiction of the parent”).

16 As explained in Yandex N.V.’s opening motion, although there is a parent-subsidiary
 17 relationship between Yandex N.V. and Yandex LLC and Yandex Inc., the independent corporate
 18 existence of these entities has been respected both in formalities and in fact. Both subsidiaries are
 19 independently organized entities with financial books and accounts, officers, and operations
 20 separate and distinct from Yandex N.V. *See* dkt. no. 17-2 (Declaration of Elena Ivashentseva,
 21 hereinafter “Ivashentseva Decl.”) at ¶¶ 9, 11, &13. Further, Yandex N.V. does not exercise day-
 22 to-day control over either of these two entities. *Id.* These distinctions between Yandex N.V. and
 23 its subsidiaries are supported by uncontroverted evidence presented in a sworn declaration by a
 24 Yandex N.V. director. Perfect 10’s opposition brief does nothing to disprove these facts.

25 **A. Under Binding Ninth Circuit Precedent, Contacts of Yandex N.V.’s Subsidiaries
 26 Cannot Be Imputed**

27 Despite repeatedly citing to *Unocal*, Perfect 10 urges this Court to misapply it to hold that
 28 Yandex N.V.’s operating subsidiaries are acting as agents and alter egos of their parent holding

1 company. As explained in Yandex N.V.’s moving papers, in *Unocal*, the Ninth Circuit adopted
 2 the reasoning of *Gallagher v. Mazda Motor of America, Inc.*, 781 F. Supp. 1079 (E.D. Pa. 1992),
 3 when analyzing claims that a subsidiary is acting as an agent for its parent. See *Unocal*, 248 F.3d
 4 at 929-30. *Gallagher* specifically held that “the subsidiary is not performing a function that the
 5 parent would otherwise have had to perform itself ([as] the holding company simply could hold
 6 another type of subsidiary.” 781 F. Supp. at 1085.

7 The primary case relied on by Perfect 10 against this authority is *Helm v. Alderwoods*
 8 *Group, Inc.*, 696 F. Supp. 2d 1057 (N.D. Cal. 2009). However, the facts of that case make it clear
 9 that, far from addressing a true holding company such as Yandex N.V., the parent entity at issue
 10 (called SCI) was an active participant in the day-to-day operations of its subsidiaries and thus
 11 outside the rule set forth in *Unocal* and in *Gallagher*. For example, the *Helm* court noted that
 12 “SCI sets policies for employees in California” and that it “controls the manner in which SCI’s
 13 California businesses provide” their services. *Id.* at 1070. For these reasons, the court concluded
 14 that “evidence supports plaintiffs’ contention that SCI exercises close control of its subsidiaries’
 15 daily operations.” *Id.*

16 Perfect 10 also discusses *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011)
 17 at length. That case is inapposite for the same reasons that *Helm* is: the parent company, rather
 18 than being a mere investor, was heavily involved in the day-to-day operations of the subsidiary.

19 *Bauman* is further distinguishable due to the stark difference in the significance of the
 20 United States operations to the parent entity. There, the Ninth Circuit found that the parent
 21 company, DCAG, existed to sell Mercedes-Benz automobiles directly. Indeed, its own corporate
 22 charter stated that it was devoted to the “development, manufacture, and sales” of those vehicles.
 23 *Id.* at 922. To that end, its United States’ subsidiary acted as its sales agent. Unlike Yandex N.V.,
 24 which receives a minuscule amount of revenue from the United States,¹ DCAG’s subsidiary in
 25 *Bauman* was responsible for nearly 20% of worldwide sales of Mercedes-Benz vehicles. *Id.*

26
 27 ¹ Currently, the entire Yandex family of companies (not just Yandex N.V.), derives less than
 28 0.4% of total annual revenue from U.S.-based sources. See Ivashentseva Decl., ¶ 14.

1 Beyond this unity of operating purpose in *Bauman*, DCAG also had substantial direct control over
 2 the activities of its subsidiary—indeed, the Ninth Circuit, reviewing the evidence, stated that
 3 “DCAG has the right to control nearly all aspects of MBUSA’s operations.” *Id.* at 924.

4 Nothing like the evidence in either *Helm* or *Bauman* exists here. In fact, the
 5 uncontested evidence is directly the contrary: Yandex N.V. does not exercise day-to-day
 6 operating control over its subsidiaries. Ivashentseva Decl., ¶ 9. Each of these entities maintains
 7 its own separate office spaces, bank accounts, officers, and employees. Perfect 10’s voluminous
 8 opposition contains no evidence to the contrary.

9 As a last ditch measure, Perfect 10 also appears to suggest that this Court can ignore
 10 precedent because, unlike a more diversified holding company such as Berkshire Hathaway,
 11 Yandex N.V. holds only Internet search engine-related assets. *See, e.g.*, Opp. at 2 (attempting to
 12 draw distinctions between Yandex N.V. and Berkshire Hathaway). No such distinction appears in
 13 the case law. For example, in *Arch v. American Tobacco Co., Inc.*, there is no suggestion of this
 14 requirement. In fact, the parent holding company at issue, B.A.T. Industries p.l.c., was
 15 specifically a tobacco holding company. 984 F. Supp. 830, 833 (E.D. Pa. 1997). Nevertheless,
 16 the court in that case followed *Gallagher* and declined to find personal jurisdiction. *Id.* at 840.

17 In any event, Perfect 10’s argument that Yandex N.V. is a single-industry company is
 18 contrary to undisputed fact. As set forth in Yandex N.V.’s original moving papers, in addition to
 19 its subsidiaries that operate Internet search engines and other online services, Yandex N.V. also
 20 continues to acquire and invest in other businesses unrelated to Internet search engines.² The most
 21 prominent example of this is the recent purchase of the SPB Software group of companies, which
 22 develop software for mobile devices such as telephones and tablets. Motion at 3:6-9 (citing
 23 evidence). Similarly, Yandex.Money, a service for conducting secure online payments that
 24 competes with PayPal in Russia, is a separate subsidiary as well. *See, e.g.*, Declaration of Rory S.

26 ² Even Yandex N.V.’s minority investment in Blekko.com, Inc., another Internet search
 27 company, is different from the Yandex-branded search. Blekko’s self-stated goal is to provide a
 28 “human curated” search, rather than a global index search such as the Yandex-branded one. *See*
 Miller Decl., Ex. 4.

1 Miller, filed concurrently (“Miller Decl.”), Ex. 1 at pp. 32 & 49.

2 **B. Selective Quotations from Yandex N.V.’s SEC Filings Cannot Alter the Reality of**
 3 **the Yandex Corporate Structure**

4 Perfect 10’s opposition also devotes much attention to selective quotations from Yandex
 5 N.V.’s SEC regulatory filings in order to suggest that Yandex N.V. is not truly a holding
 6 company, but is instead, along with its subsidiaries, a monolithic entity.

7 As an initial matter, Perfect 10 reads far more into the 20-F filing than is supported by a
 8 fair reading of the full document. Perfect 10 claims that the 20-F report “proves” that the Yandex
 9 family of companies is operated as a single, unitary entity, without regard for corporate formalities
 10 or the factual distinctions among the various Yandex entities. However, the very beginning of the
 11 20-F report makes clear that this is *not* a fair interpretation of its statements and specifically notes
 12 that “references to ‘Yandex,’ the ‘company,’ ‘we,’ ‘us,’ or similar terms are to Yandex N.V. *and*,
 13 as the context requires, its wholly owned subsidiaries.” Miller Decl., Ex. 1 at p. 4 (emphasis
 14 added). Such attempts at simplification in corporate reports do not undermine the legal distinction
 15 between a parent and its subsidiaries. *See, e.g., Japan Petroleum Co. (Nigeria) Ltd. v. Ashland*
 16 *Oil, Inc.*, 456 F. Supp. 831, 846 (D. Del. 1978) (“The representations made by AOI in its annual
 17 reports that AOI itself conducts petroleum operations in Nigeria suggests that AON serves as an
 18 agency or instrumentality of AOI. However, such representations may result from public relations
 19 motives or an attempt at simplification.”) (citing *American Trading & Prod. Corp. v. Fischbach &*
 20 *Moore, Inc.*, 311 F. Supp. 412, 416 (N.D. Ill. 1970)) (other citations omitted).

21 Another example of this is Perfect 10’s attempt to capitalize on the 20-F statement that “we
 22 operate as a single business segment.” *See, e.g.*, Opp. at 4:24. Perfect 10 is apparently unaware
 23 that this phrase is a term of art under generally accepted accounting principles (“GAAP”). As set
 24 out in the Financial Accounting Standards Board’s Statement of Financial Accounting Standards
 25 No. 131, a “segment” is defined as a component that (1) conducts business that earns revenues and
 26 incurs expenses; (2) whose operating results are regularly reviewed by the chief operating decision
 27 maker in order to allocate resources; and (3) for which discrete financial information is available.
 28 Miller Decl., Ex. 2 at ¶ 10 (FASB Standard No. 131). This accounting standard recognizes that

1 for many enterprises, these characteristics will result in there being “a single set of operating
 2 segments,” *id.* at ¶ 13, such as Yandex N.V. reports. Adherence to this GAAP standard does not
 3 mean, as Perfect 10 claims, that Yandex N.V. and all its subsidiaries operate as a single,
 4 undifferentiated business. Indeed, if Yandex N.V. did not use the term “business segment” it
 5 would be required to prepare its accounting documents and filings in a different manner—in short,
 6 the term is mandatory for the accounting and financials as reported by Yandex N.V.

7 Similarly, despite Perfect 10’s attempts to mischaracterize the 20-F statement, that filing
 8 makes it clear that Yandex N.V. is a true holding company that has no operations other than as an
 9 investor in and owner of subsidiaries. As the 20-F report states in discussing proceeds from the
 10 Yandex N.V. IPO, “[t]hose proceeds were received by our parent company, a Dutch holding
 11 company that generates no operating cash flow itself.” Miller Decl., Ex. 1 at p. 71.

12 Even if Perfect 10 had not mischaracterized the 20-F statement, the Ninth Circuit has
 13 specifically rejected attempts to ignore the realities of a corporate structure based on such
 14 materials, holding that “references in the parent’s annual report to subsidiaries or chains of
 15 subsidiaries as divisions of the parent company do not establish the existence of an alter ego
 16 relationship.” *Unocal*, 248 F.3d at 928. In connection with this statement, the Ninth Circuit cited
 17 two cases that demonstrate why Perfect 10’s argument is contrary to controlling law. *Id.* at 927.

18 The first is *Fletcher v. Atex, Inc.*, a Second Circuit decision. In that case, the plaintiffs
 19 were attempting to argue that Atex, a subsidiary of Eastman Kodak, was actually an alter ego of
 20 Kodak. 68 F.3d 1451, 1458 (2d Cir. 1995). The Second Circuit affirmed a summary judgment
 21 that Atex was **not** an alter ego of Kodak, and rejected numerous arguments advanced by the
 22 plaintiffs, including that marketing and investment literature treated the companies as a single
 23 entity. For example, among other references, Atex described himself as “a business unit” or a
 24 “division” of Kodak rather than a separate entity. *Id.* Other documents stated that Atex and
 25 Kodak had undergone a “merger.” *Id.* The Second Circuit, after reviewing the various statements
 26 cited by the plaintiffs, held that “these statements and the use of the Kodak logo are not evidence
 27 that the two companies operated as a ‘single economic entity.’” *Id.* (collecting cases).

28 *Unocal* also cited *Akzona Inc. v. E.I. Du Pont De Nemours & Co.*, 607 F. Supp. 227 (D.

1 Del. 1984). In that case, DuPont was seeking to have the court rule that two subsidiaries, Enka
 2 and Akzona, were “agents” of their parent Akzo. *Id.* at 237. One piece of evidence presented by
 3 DuPont was that a manager of Enka stated that it was “a division of Akzo.” The district court
 4 rejected this argument as “unpersuasive.” *Id.*

5 As these cases, as well as *Unocal* itself, demonstrate, statements that a parent company and
 6 its subsidiaries operate as a single entity, or that the subsidiaries are mere “divisions” of the
 7 parent, cannot support a finding that the subsidiaries are “agents” or “alter egos” of the parent,
 8 even when these statements appear in official corporate documents such as an annual report.

9 Consequently, Perfect 10’s lengthy recitation of statements in Yandex N.V.’s SEC filings
 10 is irrelevant. For similar reasons, Perfect 10’s attempt (*see* Opp. 11:10-14) to characterize
 11 statements on the website company.yandex.com as proving that Yandex N.V. is not distinct from
 12 its subsidiaries also fails—Perfect 10 points to *no* evidence that this is not yet another example of
 13 simplifications made for ease of understanding. Instead, what *is* relevant is what Perfect 10 has
 14 failed to address: whether or not the relationship between Yandex N.V. and its subsidiaries
 15 satisfies the legal tests set forth for imputing contacts. As discussed in the opening papers, the
 16 answer is clearly “no,” and no personal jurisdiction exists here. *See* Motion at 6-7 & 13-14.

17 **IV. PERFECT 10’S REMAINING JURISDICTIONAL ARGUMENTS FAIL**

18 Perfect 10’s remaining arguments regarding jurisdiction all require that Yandex N.V. be
 19 treated as one and the same as its subsidiaries. As demonstrated above, Perfect 10 has not met its
 20 burden of proving that either Yandex Inc. or Yandex LLC are alter egos or agents of Yandex N.V.
 21 Perfect 10’s remaining jurisdictional arguments thus must fail.

22 For example, Perfect 10 breezily claims that Yandex N.V. is subject to general personal
 23 jurisdiction merely because its subsidiary Yandex Inc. is located in Palo Alto. *See* Opp. at 12:4-9.
 24 It then proceeds to engage in a lengthy and factually suspect argument regarding specific personal
 25 jurisdiction that appears to be founded entirely on the operations of Yandex LLC rather than any
 26 actions of Yandex N.V. Similarly, Perfect 10 self-servingly assumes, without basis, that the
 27 search engine websites operated by Yandex LLC are controlled by Yandex N.V. Even if that were
 28 the case (it is not), as explained in Yandex N.V.’s motion, “the likelihood that personal

1 jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of
 2 commercial activity that an entity conducts over the Internet.” *Cybersell, Inc. v. Cybersell, Inc.*,
 3 130 F.3d 414, 419 (9th Cir. 1997) (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp.
 4 1119, 1124 (W.D. Pa. 1997)). This analysis is done on a spectrum between “passive” sites that
 5 just carry advertising and “interactive” sites, where users exchange information. 130 F.3d at 418.
 6 Although it identifies the proper test, Perfect 10 fails to properly conduct *any* analysis under it,
 7 instead merely asserting, without evidence or authority, that “[t]he websites in question are highly
 8 interactive,” and proceeding as though this were dispositive. Opp. at 13:22.

9 It is not. As the Ninth Circuit has noted, “[i]f the maintenance of an interactive website
 10 were sufficient to support general jurisdiction in every forum in which users interacted with the
 11 website, ‘the eventual demise of all restrictions on the personal jurisdiction of state courts’ would
 12 be the inevitable result.” *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1075-76 (9th
 13 Cir. 2011) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)). Even
 14 under the sliding-scale approach in *Cybersell* and *Zippo*, this Court must still conduct a purposeful
 15 availment analysis. Perfect 10’s opposition does not even attempt to demonstrate purposeful
 16 availment with evidence rather than mere speculation. Nor could it—the uncontested evidence
 17 demonstrates that the various Yandex-branded search engines are *not* directed at users in the
 18 United States. *See* Ivashentseva Decl., ¶ 14 (entire Yandex family of companies derives less than
 19 0.4% of the total annual revenue from U.S.-based sources).

20 Setting aside the improper attempt to conflate Yandex LLC and Yandex N.V., Perfect 10’s
 21 arguments are also highly speculative. For example, it asserts, without evidence, that various
 22 Yandex-branded websites are intended to appeal to U.S. users because they appear in English. *See*
 23 Opp. at 13:24. This ignores the existence of literally billions of non-U.S. English speakers around
 24 the globe as well as English’s place as a common second language of Internet use.³ Other similar
 25

26 ³ In its rush to speculate about the purpose of yandex.com, Perfect 10 ignores Yandex LLC’s own
 27 public statements regarding the website. As set forth in a May 19, 2010 press release, Yandex LLC
 28 explained that the search engine at yandex.com exists “for testing new search algorithms” and to
 (footnote continued)

1 speculations include the guess that “thousands of persons in California” have used Yandex-
 2 branded search products to download Perfect 10 images (*see* Opp. at 13:28-14:1), or that, because
 3 one Yandex N.V. subsidiary provides services to a different Yandex N.V. subsidiary, that
 4 somehow Yandex N.V. is responsible for both their actions. *See* Opp. at 14:15-20.

5 Perfect 10’s remaining jurisdictional arguments are based upon portraying carefully
 6 selected statements from Yandex N.V.’s public filings as directly attributable to Yandex N.V.,
 7 which, as discussed above, is incorrect. For example, Perfect 10 suggests that Yandex N.V. owns
 8 \$43.9 million worth of assets in the United States, (*see* Opp. at 20:1), which Perfect 10 contends
 9 suggests Yandex N.V. has a significant operating presence in the United States. However, these
 10 assets are, in actuality, the value of Yandex N.V.’s investments in its subsidiaries. Likewise,
 11 Perfect 10’s opposition suggests that **Yandex N.V.** has contracts with numerous California-based
 12 companies. *See* Opp. at 16:4-7. However, as explained above, this statement is the result of
 13 Perfect 10’s deliberate misreading of the SEC filing to refer specifically to Yandex N.V., rather
 14 than any of its subsidiaries. Tellingly, Perfect 10 has presented no evidence that Yandex N.V.
 15 actually has any such business dealings or contacts with California.

16 **V. YANDEX N.V. IS NOT SUBJECT TO LONG-ARM JURISDICTION UNDER
 17 FEDERAL RULE OF CIVIL PROCEDURE 4(K)(2)**

18 Perfect 10 finally argues that it should be entitled to sue Yandex N.V. in this Court under
 19 Federal Rule of Civil Procedure 4(k)(2). As Perfect 10 admits in its opposition, this too must
 20 comport with constitutional due process, and the Rule 4(k)(2) analysis is functionally identical to
 21 that for general personal jurisdiction, except that it looks to contacts with the United States as a
 22 whole. *See* Opp. at 18:24-25. As with its prior arguments, Perfect 10 again improperly conflates
 23 Yandex N.V. with Yandex Inc. and Yandex LLC. Moreover, Perfect 10’s list of contacts that it
 24 considers sufficient to establish jurisdiction under Rule 4(k)(2) is anything but—regardless of the
 25 entity at issue, many of the items listed by Perfect 10 cannot establish jurisdiction as a matter of

26
 27 provide access for Russian users seeking to conduct searches on the more than four billion pages,
 28 mostly in English, that use the Latin alphabet. *See* Miller Decl., Ex. 3.

1 law. For example, Perfect 10 again points to the designation of an agent for service of process,
 2 which cannot confer jurisdiction. Similarly, three additional bullet points concern Yandex N.V.’s
 3 activities in furtherance of its listing on the NASDAQ stock exchange, which also cannot confer
 4 jurisdiction. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 98 (2d Cir. 2000).

5 Other bullet points listed by Perfect 10 are factually inaccurate. For example, Perfect 10
 6 asserts without evidentiary support that the SPB software group of companies is located in New
 7 Jersey, when, in fact, the vast bulk of that family of companies’ operations are in St. Petersburg,
 8 Russia, with only a minimal U.S. presence. *See* Ivashentseva Decl., ¶ 11. Perfect 10 likewise
 9 claims that Yandex N.V. “owns” a data center in Las Vegas that is actually owned by a subsidiary.

10 Yandex N.V.’s nationwide contacts are no more substantial than those it has with
 11 California. Consequently, for the same reasons that the exercise of personal jurisdiction over
 12 Yandex N.V. in this Court fails to comport with due process, so too would the exercise of
 13 jurisdiction pursuant to Rule 4(k)(2).

14 **VI. PERFECT 10’S REQUEST FOR JURISDICTIONAL DISCOVERY SHOULD BE
 15 DENIED**

16 As an initial matter, Perfect 10 failed to raise, even informally, the possibility of
 17 jurisdictional discovery at any time prior to filing its opposition. Instead of seeking leave to take
 18 jurisdictional discovery and then filing a single, complete opposition, Perfect 10 wants two bites at
 19 the apple: it wants to oppose Yandex N.V.’s motion and, if that fails, to take jurisdictional
 20 discovery and bring a *second* opposition. Such inefficient games-playing wastes the time and
 21 resources of both the Court’s and Yandex N.V. Perfect 10 should not benefit, nor Yandex N.V.
 22 suffer, from the consequences of a deliberate litigation strategy. The Court should deny Perfect
 23 10’s request for jurisdictional discovery as untimely.

24 Even were Perfect 10’s requests timely, jurisdictional discovery is not an absolute right,
 25 but is subject to reasonable limits, and this Court has “broad discretion to permit or deny
 26 discovery.” *Butcher’s Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986).
 27 One of the most important limits is that a court is not required to indulge a plaintiff that fails to
 28 meet its burden of showing why such discovery is appropriate: “where a plaintiff’s claim of

1 personal jurisdiction appears to be both attenuated and based on bare allegations in the face of
 2 specific denials made by the defendants, the Court need not permit even limited discovery.”
 3 *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006). This case is a perfect
 4 example—Perfect 10 made perfunctory allegations about jurisdiction in its complaint and, when
 5 opposing Yandex N.V.’s motion to dismiss, made little attempt to identify specific factual disputes
 6 that could be resolved. Nowhere in Perfect 10’s request for jurisdictional discovery is there any
 7 attempt to provide a specific, reasonable theory that the jurisdictional discovery would be likely to
 8 prove. Thus, because Perfect 10 “points to no specific fact in dispute or needing further
 9 evidentiary support,” its request for discovery should be denied. *Herman v. YellowPages.com,*
 10 *LLC*, 780 F. Supp. 2d 1028, 1036 (S.D. Cal. 2011) (citing *Wince v. Easterbrooke Cellular Corp.*,
 11 681 F. Supp. 2d 688, 693 (N.D.W. Va. 2010)).

12 Here, Perfect 10 has requested twenty different, vast categories of documents, most
 13 spanning over half a decade. Additionally, Perfect 10 seeks these materials not only from Yandex
 14 N.V., but also the non-party entities Yandex Inc. and Yandex LLC. Despite seeking this vast
 15 range of material, Perfect 10 makes no attempt to tie any of it to the allegations of the complaint or
 16 even the theories in its opposition. Instead, it admits that it seeks approval to conduct a fishing
 17 expedition of documents located around the globe “to better understand and present to the Court
 18 the true relationships between Yandex N.V. and its [non-party] subsidiaries, Yandex Inc. and
 19 Yandex, LLC, and Yandex N.V.’s contacts in California and throughout the United States.” Opp.
 20 at 21:8-10. Courts are under no obligation to humor such fishing expeditions in the guise of
 21 jurisdictional discovery. *See, e.g., Wince*, 681 F. Supp. 2d at 693 (denying jurisdictional discovery
 22 because the court refused to sanction a “fishing expedition”).

23 Even a cursory review of the twenty categories of discovery demonstrates the
 24 objectionable nature of Perfect 10’s requests. For example, request #8 seeks five years’ worth of
 25 documents detailing all the retirement, benefits, and compensation plans for every employee not
 26 only of Yandex N.V., but also for Yandex LLC and Yandex Inc. Similarly, request #12 seeks all
 27 contracts between not only Yandex N.V. but also Yandex LLC and Yandex Inc. and a host of third
 28 parties—much of which is highly confidential and proprietary information for **both** parties to the

1 contract. Other, such as request #4, which seeks all corporate minutes of Yandex N.V., and
 2 request #16, which seeks monthly bank statements, ***to determine month ending balances***, seek
 3 highly sensitive confidential information unrelated to any jurisdictional analysis.

4 Other requests are impossibly burdensome to comply with. For example, request #20
 5 would require Yandex N.V. to obtain information from the non-party Yandex LLC to identify
 6 every individual that ever accessed an image that Perfect 10 claims was identified in its DMCA
 7 notices. Apart from the practical impossibility of this request, the DMCA notices at issue are
 8 defective, as set forth in Yandex N.V.’s opposition to Perfect 10’s motion for preliminary
 9 injunction, and do not provide any notice or clarity of ***what*** images they claim copyright in. *See*
 10 dkt. no. 19 at 15:24-16:10 (Yandex N.V.’s opposition to motion for preliminary injunction); *cf.*
 11 *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) (defective DMCA notices
 12 cannot be used to demonstrate “knowledge of infringement”).

13 Finally, as is expected for a foreign company with minimal ties to the United States, almost
 14 no documents that would be responsive to these requests are in English. The burden in both
 15 expense and time involved in translating all of these documents to English greatly outweighs any
 16 possible benefit of the documents, and is another basis to deny Perfect 10’s requests for
 17 jurisdictional discovery, or at the very least, order Perfect 10 to bear all the associated costs.

18 This Court need not permit such abusive discovery. The Ninth Circuit’s ruling in
 19 *Butcher’s Union* is a good example of appropriately denied jurisdictional discovery. In that case,
 20 the plaintiffs’ failed to explain what they hoped to prove by taking jurisdictional discovery, stating
 21 instead that they “would ‘need to engage in discovery in order to support jurisdictional
 22 allegations,’” and “only that they ‘believe’ that discovery will enable them to demonstrate”
 23 minimum contacts. *Butcher’s Union Local No. 498*, 788 F.2d at 540. These vague and
 24 conclusory statements regarding jurisdiction are no different than Perfect 10’s here. Simply
 25 stating a belief that jurisdictional discovery may uncover some unknown fact is not sufficient.

26 Nor does Perfect 10 attempt to address the evidence already before the Court regarding
 27 jurisdiction. Nowhere in its opposition does Perfect 10 even mention, let alone challenge, the
 28 Ivashentseva Declaration provided by Yandex N.V. Perfect 10 does not point to a single

1 statement in the declaration that it believes is incomplete or inaccurate. Perfect 10's silence in the
 2 face of this evidence waives any argument that it is not accurate, and the Ivashentseva Declaration
 3 should be accepted as undisputed. Consequently, any discovery would duplicate the uncontested
 4 facts set forth in that declaration, further jurisdictional discovery is not appropriate. *See, e.g.*,
 5 *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989) (holding that
 6 responses to jurisdictional discovery were not required); *Lang v. Morris*, 823 F. Supp. 2d 966, 979
 7 (N.D. Cal. 2011) ("discovery is not warranted if a plaintiff cannot 'demonstrate how further
 8 discovery would allow it to contradict the [defendant's] affidavits'").

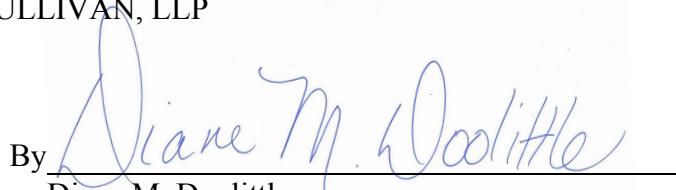
9 Should the Court contemplate allowing jurisdictional discovery, Yandex N.V. respectfully
 10 requests that it be strictly circumscribed, and that it be given the opportunity to fully object to the
 11 myriad discovery sought by Perfect 10. Moreover, because the jurisdictional discovery is sought
 12 only to aid Perfect 10 in curing a defect in its own pleadings, Yandex N.V. respectfully requests
 13 that the Court order Perfect 10 to pay all costs associated with the jurisdictional discovery it takes.

14 **Conclusion**

15 Perfect 10's opposition papers do not alter the fundamental fact of this case: Perfect 10
 16 has sued a foreign company that does no business in California for alleged copyright infringement
 17 resulting from activities that company does not control or direct. Perfect 10's opposition asks this
 18 Court to hold that Yandex N.V., a Dutch company, can be sued in California, for the purported
 19 actions of a Russian subsidiary, based upon the contacts of a separate American subsidiary.
 20 Perfect 10's arguments are contrary to both the governing law and the facts and mock the very
 21 notion of fairness, equity and due process. This Court should dismiss Perfect 10's suit in its
 22 entirety and with prejudice.

23 DATED: May 31, 2012

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